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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 705

C. D. SHEPHERD, ET AL.,

Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,

Respondents.

BRIEF OF THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, DEFENDANT-RESPONDENT,
IN OPPOSITION TO THE PETITION FOR WRIT OF
CERTIORARI AND IN OPPOSITION TO THE BRIEF
SUPPORTING SAID PETITION.

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May 9, 1949.



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22.10.1923. ab dem 1. Jan. 1924 ist der

zweite Teil des Gesetzes über die Einführung der

sozialen Sicherung in der Schweiz in Kraft.

Die sozialen Sicherungsmaßnahmen sind in den

Artikeln 1 bis 10 des Gesetzes festgelegt.

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To the Honorable Fred A. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

It is believed that a more complete and accurate statement of the case than is afforded by petitioners' statement will be of assistance to the Court.

The decision of the United States Court of Appeals for the Seventh Circuit, December 14, 1948, is reported in 171 F. 2d 594 as *Obie Fauster Hunter, et al. v. The Atchi-*

son, Topeka and Santa Fe Railway Company; C. D. Shepherd; et al. It affirmed the order of February 6, 1948 of the United States District Court for the Northern District of Illinois, Eastern Division, granting a temporary injunction, which is reported in 78 F. Supp. 984, with the District Court's findings of fact and conclusions of law. The judgment of the United States Court of Appeals became final by the denial of a petition for rehearing on January 14, 1949. (R. 345)

Obie Fauster Hunter, *et al.*, respondents herein, were the plaintiffs in the United States District Court for the Northern District of Illinois, Eastern Division, in a suit in equity in which they asked the court to enjoin The Atchison, Topeka and Santa Fe Railway Company, defendant-respondent, and C. D. Shepherd, *et al.*, petitioners, from enforcement of Award 6640 of the National Railroad Adjustment Board, First Division, which was rendered April 20, 1942. (Whenever the term "Adjustment Board" is used in this brief, it means the First Division of the National Railroad Adjustment Board.) The complaint alleged that the said plaintiffs-respondents (who hereinafter will be called plaintiffs) were parties involved in the dispute before the Adjustment Board but had no notice of the hearing. The United States District Court granted a temporary injunction. (R. 201-208) C. D. Shepherd, *et al.*, petitioners herein, appealed to the United States Court of Appeals for the Seventh Circuit. In their petition here they say that they are of the craft of employees known as brakemen (page 1) and we shall hereinafter refer to them as "the brakemen".

Award 6640 of the First Division, National Railroad Adjustment Board (R. 219-248), which plaintiffs and this defendant-respondent contend is void, originated in a protest filed with that Board, on behalf of four named brakemen in Texas, by the Brotherhood of Railroad Trainmen

(hereinafter called BRT), the duly designated representative of the class or craft of brakemen employed by The Atchison, Topeka and Santa Fe Railway Company, defendant-respondent (hereinafter called Santa Fe). (R. 219) The protest which led to Award 6640 was another step in furtherance of efforts begun by BRT in 1920. (R. 237)

Decisions of Previous Adjustment Boards.

In 1925, formal protest was made by BRT to an adjustment board, established pursuant to Title III, Section 302, Transportation Act of 1920, 41 Stat. 469, known as Train Service Board of Adjustment for the Western Region. (R. 240) The basic issue was the same as in the claim which BRT filed before the National Railroad Adjustment Board in 1939, resulting in Award 6640, which plaintiffs say is void. The BRT had agreed in writing that it would accept the decision of the Train Service Board as final and binding on the parties to the dispute. (R. 240)

On September 9, 1926, the Train Service Board ruled against BRT in Decision 2126 (R. 239, 247) and held that there was no rule in the agreement between BRT and Santa Fe which supported the claim. After that, BRT negotiated a schedule agreement with Santa Fe, effective December 1, 1926. (R. 247) Again, BRT presented the same basic issue to the same Train Service Board; and that Board, having before it Article XXIX (R. 248), again denied the claim in Decision 2336, dated February 8, 1927. (R. 240, 247)

Article XXIX of BRT Schedule.

Article XXIX, as it stands in the schedule today, is in the same language which it contained in 1926. (R. 241) It reads as follows:

"The term 'Trainman' or 'Trainmen', as used in this agreement, is understood to mean freight and passenger Brakemen, and Baggage men, with the further understanding that this definition does not change, alter or extend present application of these rules to baggage men or train porters."

Santa Fe has employed colored train porters since before 1900. (R. 235) Up to the time this suit was filed, the train porters had no collective bargaining representative and no agreement was ever entered into between Santa Fe and the train porters as a class. (R. 115) The collective agreement between Santa Fe and its brakemen provided in Article XXIX, quoted in the preceding paragraph, that the positions held and the duties performed by train porters do not come within the scope or purview of the schedule of rates, rules, and regulations for trainmen. (R. 241-242)

Craft or Class of Train Porters.

The train porters are a separate class or craft from brakemen. (R. 12-13) The work which they perform is at the head-end of passenger trains. (R. 12, 137) Since they were first employed, the train porters have always been required, along with their other work, to perform the following duties: (a) Inspect cars and test signals and brake apparatus for the safety of train movement; (b) use hand and lamp signals for the protection and movement of trains; (c) open and close switches; (d) couple and uncouple cars and engines and the hose and chain attachments thereof; and (e) compare watches when required by the rules of the company. (R. 11, 75, 235)

Both Santa Fe (R. 74, 76) and plaintiffs (R. 26, 34) admit that the employment of plaintiffs was at the will of Santa Fe. The members of plaintiffs' class or craft were carried on Santa Fe seniority rosters—one for train porters and one for chair car attendants. (R. 76)

Proceedings Before the National Railroad Adjustment Board, First Division.

In the proceedings before the Adjustment Board, Santa Fe presented the facts as herein stated (R. 235-245) and asked the Board to deny the claim made by BRT. (R. 245) In its findings (R. 246), the Adjustment Board declared that the parties were given notice of the hearing. The parties were Brotherhood of Railroad Trainmen and The Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines. (R. 219) The Secretary of the Adjustment Board testified that he gave no notice to any one other than those two parties. (R. 185)

The Adjustment Board sustained the claim and found that "The use of porters or other employees who do not hold seniority as brakemen is in violation of claimants' seniority rights" (R. 246), but made no interpretation of Article XXIX of the BRT schedule wherein BRT agreed that the work performed by train porters did not come within the scope of trainmen's work. (R. 246)

Dissent to Award 6640.

In the dissent filed by the five carrier members of the First Division of the Adjustment Board, the point just mentioned was stressed and the additional point was urged that BRT, prior to making the agreement which contained Article XXIX, had bound itself by written agreement, as representative of the brakemen (trainmen), to abide by the decision of the Train Service Board of Adjustment, which in 1926 and 1927, by two separate decisions, denied that brakemen were entitled to perform the work which, since 1900, had belonged to the separate class or craft known as train porters. (R. 246-248)

Santa Fe's Petition for Rehearing of Award 6640.

On May 14, 1942, Santa Fe filed a petition for rehearing (R. 132) and on June 3, 1942 filed an amended petition (R. 132-133). The Board never granted or denied the petition, its record showing that there was a tie vote, although the Secretary testified that only two of the five labor members participated (R. 197) and that no actual vote was taken which could result in a tie vote. (R. 198) The Secretary of the Board testified that no action would have been taken on the petition for rehearing. (R. 198-199)

Santa Fe's Agreement to Implement and Enforce the Award.

Beginning prior to January 18, 1944, BRT was insisting that Santa Fe put Award 6640 into effect without further delay. (R. 159, 167) Santa Fe informed plaintiffs' attorney of this fact on January 18, 1944. (R. 158) The award had not become final under the statute (R. 131) and the petition for rehearing was still pending when an agreement was signed between Santa Fe and BRT, April 27, 1944 (R. 154, 198, 210) to put the award into effect (R. 155); on May 3, 1944, Santa Fe withdrew its petition for rehearing of the award. (R. 133-134)

Except for the District Court's restraining order, Santa Fe would have complied with the April 27, 1944 agreement to implement and enforce the award (R. 155, 163) and that meant that the train porters would have been displaced by brakemen. (R. 164)

No evidence was offered by the brakemen to deny that BRT subjected Santa Fe to strong insistence to put the award into effect. (R. 167, 200) There is no evidence in the record that the April 27, 1944 agreement was in

pursuance of any notice prescribed by the Railway Labor Act; it states on its face (R. 210) that it is in compliance with Award 6640, which award the plaintiffs (R. 35) and Santa Fe (R. 78) and the Secretary of the Adjustment Board (R. 185) say was rendered without notice of hearing having been given to the plaintiffs.

The Award Declared Void.

The District Court found that no notice of the hearing was given to plaintiffs who were involved in the subject matter thereof, that the proceedings before the Adjustment Board were conducted outside their presence, that they were not represented or heard before the Board; that the brakemen, through the BRT, were continuing to insist that Santa Fe comply with the award; that Santa Fe's petition for rehearing was withdrawn because of the insistence of BRT, acting for the brakemen; and that the imminent displacing of the plaintiffs would be solely due to such award. (R. 205-206) On these grounds and relying on *Nord v. Griffin*, 86 F. 2d 481 (1936, CCA 7), certiorari denied in 300 U. S. 673, the District Court concluded that the award was void and that the employment rights of the plaintiffs had been interfered with through the enforcement of void Award 6640; it issued a temporary injunction February 6, 1948. (R. 206, 207)

The Decision On Appeal.

The brakemen appealed from the injunction order to the Court of Appeals for the Seventh Circuit, in which court the Santa Fe urged the affirmance of the injunction and opposed the contentions of the brakemen as it had done in the District Court and before the Adjustment Board (R. 233-245) and as it had opposed the BRT contentions

in the cases before the Train Service Board of Adjustment for the Western Region. (R. 240, 247) The Court of Appeals affirmed unanimously. (R. 308) It held that the Adjustment Board did not exercise its statutory authority to interpret and apply the contract between BRT and Santa Fe as it existed, but instead made a new and different contract between BRT (the brakemen's representative) and the carrier. (R. 306) It declared Award 6640 void because the Board exceeded its authority, and also because the award was made without notice of hearing (R. 306) to the plaintiffs as required by the Railway Labor Act.

The Court of Appeals held that the instant case is clearly distinguishable from the case of *Missouri-Kansas-Texas R. Co., et al. v. Randolph, et al.* (Eighth Cir. 1947), 164 F. 2d 4 (R. 304), in that the case before the Seventh Circuit did not seek "to obtain a judicial ruling as to the rights of the parties to the disputed work and, as already shown, the order appealed from does not pretend to make such an adjudication." (R. 305) The Seventh Circuit further held that "The rights of the parties under the order invalidating the award are neither determined nor changed. They remain just as they were before the award was made." (R. 305)

Application for Rehearing.

The brakemen applied for a rehearing December 28, 1948. (R. 309-318) Santa Fe filed its answer on January 7, 1949, asking the court to deny the rehearing. (R. 321-332) The Court of Appeals denied rehearing on January 14, 1949. (R. 345)

SUMMARY OF ARGUMENT.

I.

Notice Under the Railway Labor Act.

The Railway Labor Act commands that employees involved in a dispute before the National Railroad Adjustment Board shall be given due notice of a hearing. The Secretary of the Adjustment Board testified in the case that he gave no notice to the plaintiffs. The Court of Appeals followed the law, therefore, when it declared Award 6640 void. That award vitally affected the plaintiffs adversely and it was rendered without giving them notice of the hearing and without their participation therein. The proceeding before the Adjustment Board, on its face, related merely to wage claims of four brakemen, employed in Texas; yet the Board, without any notice to plaintiffs, rendered an award which swept out of existence this whole class of Santa Fe employees.

II.

The Adjustment Board Exceeded Its Statutory Power.

The Adjustment Board is a creature of Congress and has only the limited power which the Railway Labor Act gave it. The authority to interpret does not include the arbitrary power to make new contracts for the parties. Santa Fe never promised BRT that the trainmen whom it represents should have the right to perform the head-end work on passenger trains, which plaintiffs have performed for 50 years. The agreement between Santa Fe and BRT plainly does not extend to that work. The Court of Appeals exhaustively analyzed all the evidence and held the

award void on two grounds: lack of notice to the plaintiffs, and an exceeding of its authority by the Adjustment Board. Even a court is not empowered by law to make a new contract for parties who ask the court to construe an existing contract.

III.

An Agreement in Advance, To Be Bound by an Arbitration Award Will Be Upheld.

When persons agree in advance that they will abide by the result of an award issued by an Arbitration Board to which they submit a dispute, they will be held to that agreement. The record of this case includes the whole proceedings before the Adjustment Board and when the record is examined it cannot be doubted that BRT made such an agreement in the cases presented to the Train Service Board of Adjustment of the Western Region in 1926 and 1927. The agreement made by BRT was binding on the class of brakemen, and the petitioners in this case are brakemen. The BRT, therefore, had no right even to bring the dispute to the National Railroad Adjustment Board. If it wanted a different contract with Santa Fe, the Railway Labor Act provided a course which it could have adopted.

IV.

BRT's Vice-President Was a Party Defendant But BRT Chose Not to Intervene.

The brakemen petitioners and the Vice-President of their Organization were parties defendant in the case below. The decision of the Court of Appeals shows that BRT had actual knowledge of the case. The brakemen filed an affidavit in the case executed by their General Chairman. In another case which was before the Court of Appeals on

the same docket as this case, BRT was represented by the same attorneys who represent the brakemen here. In the other case BRT intervened. It could have done so in this case, which was pending from August 21, 1944 until 1948, before the temporary injunction was issued.

V.

There Is No Conflict Between the Seventh and Eighth Circuits.

The Court of Appeals understood the difference between a jurisdictional controversy and a simple suit in equity to protect rights which otherwise would be lost. No judicial ruling was sought in this case as to the rights of the respective parties to perform certain work, and the order which was appealed to the Seventh Circuit did not pretend to make such an adjudication. The cases relied on by the brakemen relate to outright controversies between railroad labor unions whose work-jurisdiction overlaps. Nothing like that is presented here.

The March 30, 1949 decision of the United States District Court for the Western District of Missouri, Western District, in the Eighth Circuit, in the case of *Templeton v. AT&SF Ry. Co.; Brotherhood of Railroad Trainmen, et al.* (not yet officially reported) is included in this brief as an Appendix. The case before the District Court of the Eighth Circuit dealt with the five awards of the Adjustment Board which immediately preceded Award 6640 and with the identical memorandum agreement of April 27, 1944, given to implement and enforce the award, before this Court. It held the awards void, and its findings of fact and conclusions of law are unmistakably in harmony with the Seventh Circuit. Each Court holds that an award of the Adjustment Board is void where notice is not given to parties involved in the dispute; each Court holds that when the

Board undertakes by means of an award to make a new agreement, such conduct is void; each Court holds that the effect of its decision is to place the parties back where they were before the award was rendered, free to pursue any remedies they have under the Railway Labor Act.

VI.

- (a) **Actual Knowledge of the Hearing Before the Adjustment Board.**
- (b) **Continuation of the Jurisdictional-Dispute Argument.**

(a) After a week of taking depositions in Texas, New Mexico, and Missouri, seeking for evidence that the plaintiffs or any of them had knowledge of the hearing, no such evidence was found. The sum total of the depositions was described by the Seventh Circuit as meager evidence that plaintiffs became aware of the award when it was too late to be heard. A statutory requirement concerning notice cannot be satisfied by vague and scanty knowledge of something after the fact.

(b) (Since the brakemen resumed their jurisdictional-dispute argument at pages 31 to 34 of their petition, under the heading of "Actual Knowledge," we find it necessary to follow their procedure so as to obtain continuity of arrangement.)

The essential difference in the authorities relied on by the brakemen, as compared with the law applicable to the case before this Court, is that we have no conflicting or overlapping collective agreements here. There is no dispute between collective bargaining agents here, and it affirmatively appears that judicial intervention was necessary to protect the rights of the plaintiffs.

In the Templeton decision, shown in full in the Appendix of this brief, the District Court of the Eighth Circuit ex-

tended the full power of equity to hold certain Adjustment Board awards void, but refused in the same case to rule on Santa Fe's cross-claim for a declaratory judgment. This case graphically illustrates that the Eighth Circuit is in complete harmony with the Seventh Circuit in the matter of jurisdictional disputes and justiciable controversies.

VII.

The Court of Appeals Did Not Review Adjustment Board Award 6640.

The Court of Appeals decided that the injunction was properly issued, and it held that Adjustment Board Award 6640 was void for several reasons. It found and declared that the Board ignored the BRT contract, and that the Board boldly wrote out of the existing contract the provision by which BRT had agreed with Santa Fe that train porters would keep on performing the head-end work on passenger trains, as they had done for fifty years.

The Adjustment Board had nothing before it to interpret and it did not even pretend to interpret the contract. It rewrote a contract for BRT and Santa Fe by usurping a power not conferred on it by statute. That is what the Court of Appeals said and that is what the Court meant. To say that the Court of Appeals reviewed the Adjustment Board's interpretation is to refuse to acknowledge the facts which BRT has known since 1926 when it made the agreement.

VIII.**Absence of Findings or Conclusions Regarding April 27, 1944, Contract.**

An examination of the trial Court's lengthy findings of fact and conclusions of law should be sufficient, without argument, to establish the proposition that the decision before this Court is amply supported. The brakemen made a full and complete argument in their petition for rehearing; they insistently urged the Court of Appeals to make a definite statement about the April 27, 1944 memorandum agreement which had been executed to implement and comply with void Award 6640. The brakemen told the Court of Appeals that in the absence of such findings someone might believe that the Court meant to strike down the April 27, 1944 agreement as well as the void award. Santa Fe argued this out in its answer to the petition for rehearing and maintained that the agreement was no better than the void award. When the Court of Appeals denied the petition for rehearing, therefore, no doubt could remain regarding the intention of that Court.

IX.**Adequacy of Injunction Bond.**

The action of the trial judge in refusing to grant the brakemen's motion to increase the amount of the injunction bond in this case was no different from what has been done in other cases of this character in which this Court refused to grant certiorari.

ARGUMENT.

INTRODUCTION.

The United States Court of Appeals Decided All Questions Before It in Accordance With the Requirement of the Railway Labor Act and the Established Law.

The brakemen assign six reasons for allowance of the writ (pages 14-17) and make six specifications of error. (pages 19-21). These are merely repetitions of what they argued in the United States District Court and then in the Court of Appeals for the Seventh Circuit and what they presented to that court on their petition for rehearing. (R. 309-318)

A brief review of the record will convince this Court that the essential question for decision was whether plaintiffs had a right, under Paragraph 3, First (j), to be given due notice of the hearing before the Adjustment Board and whether the complete denial of that right entitles them to the protection of a court of equity. (R. 302) The companion question decided was whether the Adjustment Board exceeded its statutory authority when, in effect, it made "a new and different contract between the brakemen and the carrier." (R. 306) The Court of Appeals correctly decided the issues before it. All questions presented by the brakemen's petition are unsubstantial. We shall first present a direct and affirmative argument to the real issues in the case. Then we shall reply in opposition to each specification of error which the brakemen have presented.

I.

Where a Statute Requires Notice To Be Given, It Is the General Rule of Law That Actual Personal Notice Is Required.

The Railway Labor Act provides in 45 U. S. C. 153, First (j), that:

“The several Divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.”

The case of *Nord v. Griffin*, 86 F. 2d 481 (1936, CCA 7), certiorari denied 300 U. S. 673, is the great landmark of legal decisions in support of the proposition that persons involved in disputes submitted to the Adjustment Board must receive the benefit which Section 3, First (j) of the Railway Labor Act conferred upon them. In that case the plaintiff contended and the court found that he was directly interested in the controversy before the Board; that his right to seniority was a contract right of which he had been deprived by an award, in a proceeding to which he was not a party and of which he had no notice. The District Court concluded that under such conditions the award was in violation of plaintiffs' rights under the constitution, and it issued an injunction. In affirming the judgment of the District Court, the Seventh Circuit Court of Appeals said:

“The trial below and this appeal do not involve the merits of the controversy. They involve solely the question of whether the appellee is to be bound by an order of an administrative board in a proceeding to which he was not a party, entered at a hearing of which he had no notice. The mere statement of the proposition is conclusive of its unsoundness. The rights of plaintiff are protected by the Fifth Amendment.” (page 484)

The Fifth Circuit Court of Appeals, in commenting on Section 3, First (j) of the Railway Labor Act, in *Estes v. Union Terminal Co.*, 89 F. 2d 768, (1937) said:

"Section 3 is rendered somewhat ambiguous by the use of the word 'involved' instead of a more comprehensive term. But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. * * * No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and a carrier are parties before the Board. * * *

"Notice may be brought to the attention of large groups of interested parties by posting it in appropriate places, the same as is usually done when an injunction is issued against a large class of persons. The difficulty of giving notice, or rather the inconvenience occasioned to the Board by doing so, would not excuse compliance with the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board, unless notice is waived." (pp. 770-771)

In the case before this court no attempt was made by any one to give notice to the plaintiffs. The Secretary of the Board admitted that the only parties notified of the hearing in the dispute submitted to the Board in Award 6640 were BRT and Santa Fe. (R. 185) From the record it appears without dispute that no notice of the pendency of the proceedings or of the hearing was given to the plaintiffs, and that they had no knowledge of the hearing.

In the quotation from the *Estes* case mention is made of informing large groups of interested parties by posting notices at appropriate places. There is no evidence in the record that any one made an attempt to notify the plain-

tiffs concerning the hearing which related only to the claims of four brakemen employed in Texas but which finally resulted in an award which attempted to sweep out of existence the whole class of Santa Fe employees represented by plaintiffs.

The case of *Washington Local Lodge No. 104 v. International Brotherhood*, 203 P. 2d 1019 (Supreme Court of Washington, 1949) is peculiarly appropriate for consideration on this issue because it dealt with the relations between a local union and its international parent. At page 1061 of its unanimous opinion, the Supreme Court of Washington declared that it is within the powers of the courts—and indeed it is their duty—to protect the property rights of the members of labor union organizations when they are threatened or endangered without an opportunity to be heard. On this basis, that court reversed the decree of the lower court and remanded the case with instructions to enter a decree enjoining the International Brotherhood "from suspending or expelling any individual members of Local 104 as members, without notice given, charges and the opportunity to be heard." (page 1061) Thus we see that courts of equity afford to a labor organization the protection which in this case the labor organization denies to others.

II.

When Congress Authorized the National Railroad Adjustment Board, Under Section 3, First (i) of the Railway Labor Act, to Interpret Agreements Between a Carrier and Its Employees, It Did Not Confer Power On the Adjustment Board to Ignore the Agreement and to Make a New and Different Contract Between the Parties.

As argued by plaintiffs and by Santa Fe, Article XXIX of the collective agreement effective December 1, 1926, be-

tween BRT and Santa Fe, expressly excluded the work which plaintiffs had been performing for many years. The Court of Appeals found that the language of Article XXIX leaves no room for doubt that the collective agreement was not to extend to such work. (R. 306) In other words, Santa Fe never promised BRT the right to perform the head-on work on passenger trains. The article in the schedule which establishes this proposition was set out in the sworn complaint filed by the plaintiffs (R. 22, 38) and again in the brakemen's Exhibit 2. (R. 241) There was nothing for the Adjustment Board to interpret, in view of the clear and convincing language of Article XXIX.

As found by the Court of Appeals, the Adjustment Board, instead of exercising its statutory authority, merely wrote a new provision by means of which it arrived at the conclusion stated in Award 6640, which has now been declared void. The brakemen had every opportunity to produce oral and written evidence, since August 21, 1944, but did not put a single witness on the stand. They put in such evidence as they desired, but were satisfied merely to file an affidavit of their General Chairman, dated January 23, 1948 (R. 144), which related to the amount of the injunction bond fixed by the trial court. It can not be doubted that the trial court was impressed by the failure of the brakemen to produce any evidence on the vital points of the case. Ever since February 8, 1927, when the Train Service Board of Adjustment for the Western Region, in its Decision 2336, denied the BRT claim, based on the same collective agreement effective December 1, 1926, the BRT has known that Article XXIX of that agreement did not give the brakemen the right to do the work which plaintiffs perform at the head-end of passenger trains on the Santa Fe. (R. 247-248)

The Court of Appeals, after an exhaustive analysis of the issues in the case, not only held Award 6640 void because

the Board exceeded its authority and also because the award was made without notice to the plaintiffs as required by the Railway Labor Act, by reason of which their constitutional right to a hearing was denied, but the Court vindicated what the five members of the Board who dissented from the award stated in their dissenting opinion:

"The lesson of the award is that contracts may be altered, changed, or amended, in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement. That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us." (R. 306)

The power of the Adjustment Board is specifically limited by Section 153(i) to the interpretation or application of agreements. It is given no authority whatever to change existing agreements or to make contracts for the parties or to write seniority provisions into a contract. This is a power which has never been conferred even upon any court. The action of the Board, therefore, in deleting part of Article XXIX from the contract, was without statutory sanction and consequently Award 6640 is void.

III.

Parties Who Agree in Advance That a Dispute Submitted by Them to an Arbitration Board Will Be Final and Binding Will Be Held to Such an Agreement, in Law or Equity, Upon the Rendering of an Award.

The BRT bound itself by written agreement, as to which no one has ever contended that it was not freely and voluntarily made, to accept as final and binding the decisions of the Train Service Board of Adjustment for the Western Region. (R. 240) Two disputes were submitted to the

Train Service Board by BRT, which resulted in Decision No. 2126 in 1926 and Decision No. 2336 in 1927, involving the same issues as were contained in Award 6640 decided by the Adjustment Board in 1942. (R. 246-248) In both decisions the Train Service Board ruled against BRT.

In its first decision, the Train Service Board found that the past practice under which everybody concerned had operated—the brakemen, Santa Fe, and the train porters—and the absence of a rule in BRT's collective agreement, required a denial of the claim. (R. 247) BRT immediately acted to overcome the difficulty of "the absence of a schedule rule" (R. 241, 247) which was the foundation of the Train Service Board's September 9, 1926 decision, and, effective December 1, 1926, it negotiated a schedule rule with Santa Fe, known as Article XXIX. Having done so, it resubmitted the issue a second time to the Train Service Board which again denied the BRT claim. (Decision 2336, dated February 8, 1927; R. 247)

BRT was bound to accept this decision as final and binding. This being the situation, BRT had no right to present a claim to the Adjustment Board covering the issues comprised by Award 6640. Because of the valid agreement to accept the Train Service Board decisions as final and binding, it can not be said that there existed any legal dispute between BRT and Santa Fe after those decisions were made. Since the whole issue had been determined in the decisions of 1926 and 1927, no dispute could arise for the determination of the Adjustment Board; and, therefore, the claim submitted to it in 1939, which resulted in Award 6640 in 1942, was not a genuine controversy.

When a person makes an agreement to arbitrate a dispute and stipulates that he will accept the decision as final and binding, and subsequent to that the arbitrator decides the dispute, it is the universal rule that the person making such an agreement can not escape its binding effect. The

law on this point is stated in 3 Am. Jur., Arbitration and Award, par. 30, p. 856:

"If nothing in the terms of an arbitration agreement contravenes public policy in other respects, it is the universal rule that however comprehensive it may be, the mere fact that it provides for arbitration of disputes which may arise in the future will not, when once it has been executed,—that is, fully carried out by the parties and a final, certain, complete, and honest award made by the arbitrators upon all matters submitted, pursuant to the terms of the submission,—be ground for holding it invalid; it will then effectually bind the parties."

The leading case is *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, (1924) which clearly explains the law as follows:

"* * * an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. If executed,—that is, if the award has been made,—effect will be given to the award in any appropriate proceeding at law or in equity." (p. 121)

The Court of Appeals took full cognizance of the fact that, notwithstanding the two decisions which the Train Service Board of Adjustment for the Western Region had rendered against BRT—one of them before and the other after Article XXIX was placed in the December 1, 1926 collective agreement between BRT and Santa Fe—that Organization filed another claim before the National Railroad Adjustment Board, in complete disregard of its having entered into a written agreement that the decision by the Train Service Board would be final and binding on it. (R. 305)

The opinion of the Court of Appeals, by unanswerable logic, shows that BRT made an agreement with Santa Fe that it would abide the result of the Train Service Board

of Adjustment cases decided in 1926 and 1927. (R. 305) BRT, therefore, bargained away its right to bring this case before the National Railroad Adjustment Board. (R. 305) Not only that, but, by the express terms of the 1926 agreement which BRT made with Santa Fe, it again bargained away any right to make a claim such as it presented in the proceedings which resulted in Award 6640, now declared void. (R. 306)

Santa Fe will now proceed to make direct reply in opposition to each question and specification of error presented by the brakemen.

IV.

The Vice-President of the Brotherhood of Railroad Trainmen Was Served as a Defendant in the Case Below, and the Court of Appeals Has Found That the Brotherhood Had Actual Notice of the Suit.

(In Reply to pages 25-27 of Brakemen's Petition.)

Adjustment Board Award 6640 was rendered on a claim which BRT brought against Santa Fe on behalf of certain brakemen. Plaintiffs sued the petitioners in this case, as representative of the class or craft of employees known as brakemen (page 1); plaintiffs also made F. W. Coyle, Vice-President of the BRT, a party defendant. The Court of Appeals has found that the BRT had actual notice of the suit. (R. 307) It further found that BRT made no application for intervention, which it could have done had it been desirous of being heard.

The case of *Baltimore & Ohio Railroad Company, et al. v. The Chicago River & Indiana Railroad Company, et al.* (C. A. 7, 1948), 170 F. 2d 654 (certiorari denied April 4, 1949) was argued before the United States Court of Ap-

peals, Seventh Circuit, and decided by that court during the same term in which the case which is now before this Court was argued and decided. In the *Baltimore and Ohio* case, the BRT knew about the case and intervened. BRT was represented in that case by the same attorneys who are petitioning for a writ of certiorari in this case. In both cases BRT had actual knowledge. In the one case it voluntarily intervened. In the case before this Court, the petitioners are brakemen and are, therefore, represented on the Santa Fe by BRT; during the hearing before the United States District Court, the brakemen placed in evidence an affidavit of General Chairman Oral B. Mullen, dated January 23, 1948. (R. 144, 179-180) The affiant described himself as "General Chairman of the Brotherhood of Railroad Trainmen, Atchison, Topeka and Santa Fe Railway Company, Eastern and Western Lines." (R. 144) The BRT therefore participated in this case to that extent, and as it saw fit; but it made no formal effort to intervene in the case since August 21, 1944, the date when the complaint was filed in the District Court of the United States, Northern District of Illinois, Eastern Division. (R. 2)

Santa Fe believes that this Court will be no more disposed to permit litigants to play fast and loose with it than the United States Court of Appeals for the Seventh Circuit was willing to do. The opinion of the Seventh Circuit clearly shows that the order appealed from takes nothing away from the brakemen to which they were rightfully entitled. (R. 306)

At pages 26 to 27 of their petition for certiorari, the brakemen say that the decision of the Court of Appeals has the effect of denying the efficacy of railroad labor union conduct in submitting disputes for adjustment under the Railway Labor Act and in bargaining collectively to settle them. This is the same as saying that BRT, which acted

as representative of the brakemen before the Adjustment Board, is exempt from the requirements of the Railway Labor Act, and that it can have the benefit of a void award and of an agreement made to implement and enforce a void award.

There can be no question that, in the case before this Court, BRT knew about the proceedings at all stages of the litigation. Its Vice-President was a party defendant in the case below and its General Chairman participated in the case by filing the affidavit in respect to a point which the brakemen now urge in their petition as a reason for allowance of the writ (page 16) and as a specification of error (page 21).

The underlying question of the right to be notified of a hearing, for which plaintiffs and Santa Fe have been contending throughout this litigation, was satisfied as to BRT; and in support of this proposition the Court of Appeals not only cited the *Baltimore and Ohio* case, in which BRT had chosen to intervene, but it referred to cases decided by this Court in which other railroad labor organizations have intervened.

We submit that under all the facts and circumstances this issue has been correctly determined by the Court of Appeals.

V.

There Is No Conflict Between the Seventh and Eighth Circuits. There Is Complete Agreement Between the Decisions of Those Two Circuits. No Jurisdictional Dispute Exists in This Case. This Is a Simple Equity Suit in Which the Denial of Statutory Rights Belonging to Plaintiffs Has Been Enjoined.

(In Reply to pages 27-29 of Brakemen's Petition.)

The brakemen assert that there is a conflict between the Seventh and Eighth Circuits. They rely on the case of *Missouri-Kansas-Texas R. Co. et al. v. Randolph* (8th Cir. 1947), 164 F. 2d 4; certiorari denied in 334 U. S. 818. They say that the factual situations in the two cases are identical, except that in the case before this Court the matters in issue had been referred to the Adjustment Board; whereas, in the *M-K-T v. Randolph* case, decided by the Eighth Circuit, that had not been done. This is the equivalent of saying that two cases are exactly alike except for the fact that they are different. The Court of Appeals for the Seventh Circuit had no difficulty in determining that there is only the most superficial similarity between the cases. (R. 302, 304) It pointed out that in the *M-K-T v. Randolph* case relief was sought in court without first employing the Adjustment Board procedure under the provisions of the Railway Labor Act. In the case before this Court, however, we are dealing with a matter that *had been* referred to the Board. This suit attacked the award which the Adjustment Board rendered in disobedience of the explicit command of the Railway Labor Act to give due notice to parties involved in the dispute. In this case the Adjustment Board also went beyond its authority to interpret the collective agreement between BRT and Santa Fe and made a new agreement by ignoring

the substance of the one before it. (R. 304) These elements do not obtain in the *M-K-T v. Randolph* case.

The Seventh Circuit emphasized the fact that the case before this Court is completely different from *M-K-T v. Randolph*, because in the latter case it was sought to obtain a judicial ruling as to the rights of the parties to perform certain work; whereas, in the case before this Court "The order appealed from does not pretend to make such adjudication." (R. 305)

The Eighth Circuit merely said that the plaintiffs in the *M-K-T v. Randolph* case should not have submitted their dispute to the courts in the first instance but should have resorted to the Adjustment Board. The case before this Court is one in equity, wherein the plaintiffs have been granted an injunction against the consequences of an Adjustment Board award already rendered. Where else, except to an equity court, should they have gone for relief from the wrong and from what would confront them now, except for the intervention of the District Court's injunction? Unlike the situation in the *M-K-T v. Randolph* case, the present dispute did go to the Adjustment Board first. But when it was taken there it was so handled as to deprive parties involved in the dispute from being heard. From a reading of the whole opinion in the *M-K-T v. Randolph* case it is clear that the court means that the whole dispute must first go to the Adjustment Board rather than to a court. It does not mean that certain parties can take a case to the Board in a manner contrary to the Railway Labor Act and thereafter be beyond the reach of equity where they can enjoy the fruits of an award so obtained.

The courts would indeed be innocent and without practical knowledge or experience if they were willing to accept the theory of the brakemen, as stated at page 28 of their petition, that Award 6640 was merely a decision as

to a few isolated wage claims and that it did not amount to an order requiring that Santa Fe give the head-end work on passenger trains to brakemen—that is, to those holding seniority on the brakemen's roster of the Santa Fe. This, of course, would mean those individuals in the class represented on the Santa Fe by BRT.

The entire history of awards—whether rendered by the Adjustment Board, or by arbitration boards, or by fact-finding agencies—is contrary to such an idea. Could any one reasonably believe that if back wage claims are sustained against an employer, and thereafter he makes no change in the handling which resulted in such claims, there would be an end to the matter? Would not wage claims continue to accumulate and payment be demanded on the basis of the award? Does any one doubt that the various brotherhoods have been alert and insistent to require that carriers change their practices to conform with Board awards, even going so far in many instances as to threaten the ultimate in economic pressure to obtain that result?

The additional argument which the brakemen make at page 28 of their petition, regarding the April 27, 1944 memorandum agreement, is that it was the memorandum and not the award which had the effect of taking the head-end work away from the train porters and giving it to the brakemen. They say that the injunction had no effect on the award but, instead, has prohibited performance of the April 27, 1944 memorandum agreement.

They presented all this in oral argument before the Seventh Circuit. This is shown at the bottom of page 28 of their petition before this Court where they quote Judge Major's question. They omit the answer to that question which was to the effect that the agreement would fall with the award. The answer will be found in the brakemen's petition for rehearing. (R. 313) Santa Fe

joined issue on each occasion, in the oral argument and in its answer to the brakemen's petition for rehearing. (R. 329-331)

On page 29, the brakemen complain that the Seventh Circuit has not "seen fit to mention the April 27, 1944 agreement in its opinion." Again, this is what they complained of in their petition for rehearing. And all this was brought into full focus by Santa Fe's answer to their petition for rehearing, which we respectfully request this Court to examine. (R. 329-331)

Under these facts and circumstances, it must, therefore, be accepted that when the Court of Appeals denied their petition for rehearing, January 14, 1949 (R. 345) it did so with full understanding of the entire issue as presented by the brakemen. It considered the whole matter; it intended to, and did, dispose of it effectively. If this were not so, the Seventh Circuit would have granted a rehearing.

Certainly, the District Court did not intend to issue a meaningless injunction. According to BRT's petition for rehearing, the injunction of the District Court, which the Seventh Circuit has affirmed, would do no more than prevent Santa Fe from complying with Award 6640, and at the same time it would permit Santa Fe to carry out the April 27, 1944 memorandum which was entered into for the purpose of complying with the void award. In short, if we follow the reasoning of BRT's petition for rehearing, the injunction would fail to accomplish what the court intended to do. On the one hand, it would command Santa Fe to leave plaintiffs on their jobs; and, on the other hand, it would give approval to Santa Fe's removing the plaintiffs from those same jobs.

The suggestion contained in BRT's argument would make the decision a masterpiece of futility. The place of equity in American law would indeed be weak and pitiful if such a contradictory result were to prevail.

The analysis of the *M-K-T v. Randolph* case which the Seventh Circuit made is so clear and convincing (R. 304-305) that additional argument is almost superfluous for the purpose of refuting the claim made by the brakemen that a jurisdictional dispute is involved in both cases. The supposed conflict between the decisions of the Courts of Appeal for the Seventh and Eighth Circuits is imaginary. The real situation is that the Seventh and Eighth Circuits are in complete harmony. We refer to the case of *Templeton v. The Atchison, Topeka and Santa Fe Railway Company; Panhandle and Santa Fe Railway Company; and Brotherhood of Railway Trainmen* (hereinafter called the *Templeton* case), decided March 30, 1949, by the United States District Court for the Western District of Missouri, Western Division, Case No. 4234, not yet officially reported—a case practically identical with the one now before this Court. The findings of fact and conclusions of law in the *Templeton* case are included as an Appendix to this brief. On April 20, 1949, an injunction decree was entered in accordance with paragraph 10 of Judge Ridge's conclusions of law. (Appendix, pp. 15-16)

An examination of the *Templeton* case will disclose at once that the precise questions which were before the Court of Appeals for the Seventh Circuit were decided by the United States District Court of the Eighth Circuit and that the latter court is completely in accord, instead of in conflict, with the Seventh Circuit. Five awards of the National Railroad Adjustment Board were involved in the *Templeton* case; namely, Awards 6635 to 6639, inclusive. In each of these awards the claim was brought by BRT. The awards were issued the same day as Award 6640, now before this Court; namely, April 20, 1942. (R. 299; Appendix p. 8)

In the *Templeton* case, as in the case now before this Court, there was the same memorandum agreement dated

April 27, 1944, between F. W. Coyle, Vice-President of BRT and S. C. Kirkpatrick, representative of the Santa Fe. (R. 210-216; Appendix p. 9) The plaintiffs in the case before this Court were given no notice of the pendency of the proceedings before the Adjustment Board, and in like manner the plaintiffs in the *Templeton* case were deprived of any such notice. (R. 302; Appendix pp. 7, 8, 13)

In the case before this Court, Award 6640 of the Adjustment Board was declared void by the Seventh Circuit for lack of notice to parties involved in the dispute and also on the ground that the Adjustment Board exceeded its authority and in reality wrote a new contract between BRT and Santa Fe. (R. 306)

In the *Templeton* case, Awards 6635 to 6639, inclusive, of the Adjustment Board were declared void by the District Court of Missouri for the same reasons. (Appendix pp. 13-15) In the case before this Court, the Seventh Circuit declared that "the parties and the carrier are again free to attempt to settle the dispute by collective bargaining or an appropriate proceeding under the Railway Labor Act." (R. 302) In the *Templeton* case, the District Court of the Eighth Circuit said: "The parties are not restrained and enjoined from pursuing any remedies they may have under the Railway Labor Act." (Appendix p. 16)

The only important distinction between the decision in the case before this Court and the one in the *Templeton* case is that the District Court of the Eighth Circuit went farther and explicitly declared void the April 27, 1944 agreement which was executed by Santa Fe and BRT, for the purpose of complying with Awards 6636 to 6639 (Appendix pp. 14, 16); whereas, the Seventh Circuit, in the case now before this Court did so impliedly, instead of expressly, with respect to the identical agreement which included compliance with Award 6640. (R. 210)

Santa Fe, therefore, submits to this Honorable Court that there is no conflict of decisions between the Seventh and Eighth Circuits, and that consequently the basic ground urged by the brakemen petitioners for the granting of a writ of certiorari does not exist.

At page 29 of their petition, the brakemen say that both the *M-K-T v. Randolph* case and the case now before this Court purport to follow *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946) and that the decision in the *Pitney* case shows the need to resolve the conflict here. We have already demonstrated that no conflict exists, and we shall now prove that the *Pitney* decision was rightly applied in both cases.

In the *Pitney* case the Court was dealing with two questions: (1) the control which it should exercise over trustees appointed under the Bankruptcy Act; and (2) a jurisdictional dispute between different labor organizations. The railroad had entered into collective bargaining contracts with both ORC and BRT, which were claimed to be conflicting and overlapping. Suit was brought by ORC without any of the parties having first gone either to the Adjustment Board or Mediation Board. The Court found that each of the collective bargaining agreements had to be considered in the light of the other, together with the evidence as to usage, practice, and custom, and that the factual question was intricate and technical. It, therefore, held that the matter should first be referred to the agency especially competent and specifically designated by Congress to deal with such matters. However, in so holding, the Court said (page 567) that the statutory agency should have the first opportunity to pass on the issue, and that the extraordinary relief of an injunction should be withheld until it had done so. "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute."

In our case we have no jurisdictional dispute. There are no conflicting agreements between the railroad and different labor organizations. There is only one contract involved—that between the railroad and BRT. There are no intricate and technical questions of fact. Furthermore, the matter *has been* referred to the Adjustment Board and the Adjustment Board has acted wrongfully; and it now plainly appears that relief by way of judicial action was necessary to insure compliance with the Railway Labor Act. Therefore, the *Pitney* case supports the position of the plaintiffs and is against the brakemen in the case now before this Court. That the *Pitney* case did not deprive the court of jurisdiction is conclusively shown by the statement on page 566:

"Of course, where the statute is so obviously violated that 'a sacrifice or obliteration of a right which Congress * * * created' to protect the interest of individuals or the public is clearly shown, a court of equity could, in a proper case, intervene."

It is plain to be seen, therefore, that the Norris-La-Guardia Act has no application here because this is not a labor dispute case. (R. 301-302)

VI.

- (a) **There Was No Evidence in This Case Which Could Possibly Support a Specification Concerning Actual Knowledge by the Plaintiffs of the Hearing Before the Adjustment Board in Respect to Award 6640.**
- (b) **Reply to the Brakemen's Jurisdictional-Dispute Argument. (Continuation from Part V of This Brief.)**

(In Reply to pages 30-34 of Brakemen's Petition.)

The argument contained at pages 30 to 34 of the brakemen's petition is a mere restatement of what was pre-

sented in the District Court and before the Court of Appeals. At page 30 of their petition, the brakemen state it to be a fact "that the porters had actual knowledge" of the Adjustment Board proceedings. This is indeed a strange and unsupportable assertion if it is meant to suggest that they knew of the hearing. The attorneys representing all the parties in this case, pursuant to stipulation, spent a whole week in Texas, New Mexico, and Missouri taking the depositions of forty witnesses. (R. 173-174) The sum total of the evidence so obtained was properly described by the Court of Appeals as being "meager evidence that they became aware of the award subsequent to its entry." (R. 303) The purpose of taking the depositions of the train porters in Amarillo, Texas; Albuquerque, New Mexico; and Kansas City, Missouri, was to determine whether the train porters had any actual knowledge of the hearing as to which it is certain they had no notice.

The Railway Labor Act requires notice of the hearing, and certainly that requirement would not be satisfied by a substitute knowledge of something *subsequent* to the hearing. There is nothing in the record, and indeed the brakemen have at no time argued, that plaintiffs had any notice or knowledge of any kind concerning the *hearing*. The award was rendered April 20, 1942 (R. 299) and, as stated by the Court of Appeals, the only semblance of any evidence of knowledge on the part of any of the plaintiffs was in relation to some vague information concerning a petition for rehearing, which, of course, was necessarily long after the hearing which led to Award 6640. (R. 303)

In a pre-trial decision in the *Templeton* case, (October 5, 1946), 7 Federal Rules Decision 116, BRT raised the issue of actual knowledge, in a motion to require plaintiff in that case to state whether or not he and the messenger-baggagemen, whom he claimed to represent, had actual knowledge of the proceedings in the Adjustment Board.

In support thereof BRT cited the *Elgin, Joliet & Eastern R. Co. v. Burley* case, (1946), 327 U. S. 661, in the same manner as the brakemen have cited that case at page 31 of their petition here. But the District Court of Missouri pointed out that the portion of the opinion in the *Burley* case on which BRT was relying is pertinent only to the question of "agency", as considered in the *Burley* opinion. The District Court of Missouri went on to say that it is not the ruling in the *Burley* case that actual knowledge of the pendency of a proceeding before the Adjustment Board, without more, is sufficient to make binding an award of that Board. On the contrary, the District Court of Missouri said that the *Burley* decision adheres to the proposition that compliance with the provisions of the Act as to notice, hearing and participation or representation before the Board, is essential before an award of the Board would be binding on a party. The District Court of Missouri also said, in the *Templeton* case, 7 Federal Rules Decision 116, at page 118:

"Conceding that actual knowledge of a proceeding before the National Railroad Adjustment Board alone may be sufficient to estop a person from attacking an award of such Board, which I sincerely doubt, yet if a person with actual knowledge was not permitted to be heard either in person or by counsel, then the award of such Board would be void if, in fact, it undertook to adjudicate and destroy rights personal to such a party. The effect of the ruling in the *Burley* case sustains plaintiff's contention with reference to the failure to give notice, as alleged in his petition * * *."

The reasoning contained in the opinion of the Seventh Circuit in the case before this Court, and the reasoning of the District Court of Missouri in the *Templeton* case, 7 Federal Rules Decisions 116, demonstrate, we believe, that there is no substance to this secondary position of

the brakemen. If a person is legally entitled to notice of a hearing, as in this case where the Railway Labor Act so provides, we believe that he can not lawfully be denied that right on the basis that some vague, inconclusive or random statements concerning the subject matter generally should be considered a sufficient substitute for the statutory notice to which he was entitled.

At pages 31 to 34 of their petition, the brakemen conjecture what the plaintiffs in this case might have done if a proper legal notice had been furnished them of the pendency of the proceedings then before the Adjustment Board and prior to the hearing which resulted in Award 6640. By this means the brakemen attempt to reconstruct their unsuccessful theory that a jurisdictional dispute is involved in the case before this Court. But all such argument by the brakemen can have no effect for two reasons. First, no jurisdictional dispute in fact is contained in this case—this having been shown clearly by the opinion of the Seventh Circuit (R. 304-305), and again by the opinion of the District Court of the Eighth Circuit, in the *Templeton* case. (Appendix, pp. 13-16) Second, when Congress gave parties involved in any dispute submitted to the Adjustment Board the right to be given due notice of a hearing, it did not circumscribe, limit or condition the right in regard to the use they might make of the notice or concerning the exercise of whatever remedies they might want to pursue upon the receipt of such notice. Over and above all this portion of the argument by the brakemen petitioners, and completely blotting out its show of significance, is the fact that both the Seventh Circuit and the United States District Court of the Eighth Circuit have held that the Adjustment Board exceeded its authority by rendering awards which did not amount to an interpretation of a collective agreement, but were in reality the writing of a new agreement between BRT and Santa Fe. (R. 306) (Appendix, pp. 14-16)

At page 32 of their petition, the brakemen mention and quote from *Order of Railroad Telegraphers, et al. v. New Orleans, Texas & Mexico Ry. Co., et al.*, 156 F. 2d 1 (8th Cir. 1946); certiorari denied, 329 U. S. 758. But in that case the action was a declaratory judgment suit brought by one union against another union. The Eighth Circuit declared:

"The controversy concerns the proper interpretation and application of the collective bargaining contracts of the two unions to the positions and work performed by the Telegraphers' Craft on the one hand and the Clerks' Craft on the other."

In the case before this Court there are no conflicting collective bargaining agreements between the railroad and different labor organizations. There is only one collective bargaining contract involved—the one between Santa Fe and BRT. The plaintiffs in the instant case did not ask for an interpretation of any collective bargaining contract. In short, the *Order of Railroad Telegraphers* case involves a jurisdictional dispute between two railroad unions, each having a collective bargaining contract with the employing carrier and each contending that its contract, construed in the light of custom and usage, gave it jurisdiction over the work assigned to the other union. In that case, the Eighth Circuit held that it could not adjudicate jurisdictional disputes between the two collective bargaining organizations.

The Seventh Circuit made it clear that in the case before this Court, a jurisdictional ruling was not sought to be obtained as to the rights of the parties to the performance of head-end work on passenger trains, and that the order appealed from did not make or pretend to make such an adjudication. (R. 305) The opinion of the Seventh Circuit shows that the rights of the parties under the order invalidating the award have not been determined and have not been changed; they re-

main just as they were before the award was made. (R. 305)

Certainly, this does not present a situation in which the court has invaded the field committed to the special governmental agency designed by Congress to handle the settlement of disputes under the Railway Labor Act. Here, in fact, is the opposite. No labor dispute has been settled by the Seventh Circuit's decision. This case bears no resemblance to the Supreme Court's decisions on the subject of jurisdictional disputes. It is not like that of *General Committee v. M-K-T Railroad*, 320 U. S. 323 (1943), a controversy between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. It is not like the *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946), a controversy between the Brotherhood of Railroad Trainmen and the Order of Railway Conductors, which we have analyzed at pages 32-33, hereof. The decision of the Seventh Circuit does not direct the Adjustment Board how to decide the dispute. It merely exerts the power of equity to prevent the Board from defeating the Railway Labor Act, and it leaves the whole dispute as it was before the void award was rendered.

The essential difference in the authorities relied on by the brakemen is that in the case before this Court there are no conflicting or overlapping collective agreements; there is no dispute between collective bargaining agents; there is no question of representation of a class or craft; and it affirmatively appears that judicial intervention was necessary to protect the rights of the plaintiffs.

Nothing could more clearly show the distinction between a case which presents a justiciable controversy, such as the one before this Court, as compared with a case which does not present a justiciable controversy, than paragraph (9)

of the conclusions of law by the District Court of Missouri in the *Templeton* case, decided March 30, 1949. (Appendix, p. 15) After granting the relief prayed for by the plaintiff in that case on issues which parallel those in the case before this Court, the District Court of Missouri refused to act on Santa Fe's cross-claim asking for a declaratory judgment to give a construction to the provisions of a different collective bargaining agreement between Santa Fe and the Trainmen, than the agreement upon which the void Awards 6635 to 6639, inclusive, had been predicated.

That is, the District Court of Missouri held that those Adjustment Board awards were void because no notice had been given to parties involved in the dispute and because the awards were not premised on any existing agreement between Santa Fe and BRT. On this basis, the Court concluded that the Adjustment Board made a new agreement for BRT and Santa Fe and that it went beyond the authority and jurisdiction conferred on it by Section 3, First (i) of the Railway Labor Act. (Appendix, pp. 14-15)

However, as to Santa Fe's request for a declaratory judgment to go outside the issues presented by Awards 6635 to 6639, inclusive, which related to the Eastern and Western Lines' contract between BRT and Santa Fe, the Court concluded that it had no jurisdiction to entertain a dispute on a matter which had not been referred to the Adjustment Board, and accordingly Santa Fe's cross-claim in the *Templeton* case was dismissed. (Appendix, p. 15) Then, in like manner as the Seventh Circuit had done, the Court concluded that the parties were not restrained or enjoined from pursuing any remedies they may have under the Railway Labor Act. (Appendix, p. 16)

Thus, we see that the *Templeton* decision of the District Court of the Eighth Circuit fully harmonizes with the decision of the Seventh Circuit now before this Court, and

that there is no legal foundation for the lengthy argument on the subject of justiciable controversies which runs all through the petition submitted by the brakemen to this Court.

Everything that is stated by the brakemen petitioners at page 34 of their petition, in which they suggest what the plaintiffs in this case might have done, instead of appealing, as they did, to a court of equity to protect their rights against the enforcement of a void award, is more properly a statement of what BRT should have done, and should now do. If BRT desired to strike out of its schedule of rules with Santa Fe the clause in Article XXIX which provides that the rules do not extend to train porters, there was, and is, a legal way to go about it under the Railway Labor Act. In spite of the fact that the Train Service Board of Adjustment awards had gone against BRT (R. 246-248; 305), and notwithstanding whether Santa Fe or the plaintiffs might have been opposed to such a course, nothing in the law can prevent, or could have prevented, BRT from serving a notice upon Santa Fe under Section 6 of the Railway Labor Act, and submitting a proposal to require Santa Fe to give the brakemen the right to perform head-end work on passenger trains. If Santa Fe had been, or would be, unwilling to agree to this proposal, the provisions of the Railway Labor Act authorize BRT to invoke the services of the National Mediation Board; and, if they had failed, or should hereafter fail, to obtain their objective by that means, arbitration under the Railway Labor Act could have been, and can be, proposed; and, if that had been, or may be, rejected by Santa Fe, the statute would have permitted, and now permits, the President to create an emergency board to hold hearings and make findings and recommendations in regard to the dispute.

In the situation which this litigation now presents, as determined by the Court of Appeals of the Seventh Circuit

and as determined by the District Court of the Eighth Circuit in the *Templeton* case, the course indicated still remains open to BRT. Santa Fe submits that the meaning of the decision now before this Court (R. 299-307), and the meaning of the *Templeton* case (Appendix 1-16), is that the courts will not sanction an unlawful by-passing of the legitimate methods of collective bargaining prescribed by the Railway Labor Act.

VII.

The Court of Appeals of the Seventh Circuit Did Not Review an Interpretation of the Adjustment Board in Award 6640. It Decided, First, That the Award Was Void for Lack of Notice to Parties Involved in the Dispute and, Secondly, That the Board Did Not Interpret an Existing Agreement But Made and Declared a New Agreement for the Parties.

(In Reply to pages 35-36 of Brakemen's Petition.)

The exposition of the Court of Appeals of the Seventh Circuit is so straightforward and simple (R. 306) that it is difficult to make it any plainer. It says that the agreement between BRT and Santa Fe, contained in Article XXIX of the December 1, 1926 schedule between those parties, "leaves no room for doubt that such agreement was not to extend to the work then being performed by the porters." Even the brakemen petitioners do not deny that this is a fact. But they say that the court did not have the whole contract before it and that the memorandum agreement of April 27, 1944 stands in the way of such a conclusion.

As to the first point, Santa Fe repeats that since February 8, 1927, BRT knew that Article XXIX of its collective agreement meant just what the Seventh Circuit has said it means. The Train Service Board of Adjustment for the Western Region said no less in its Decision 2336, on

February 8, 1927. That decision was shortly after the December 1, 1926 agreement had been negotiated between BRT and Santa Fe. The same December 1, 1926 agreement is still in effect between Santa Fe and BRT. Since 1927, therefore, BRT has known that Article XXIX of its collective agreement did not give the brakemen the right to do the work which plaintiffs were performing at the head-end of passenger trains on the Santa Fe. (R. 247-248)

If there were any evidence in existence to dispute the fact that the BRT agreement "was not to extend to the work then being performed by the porters" (R. 306), such evidence would have been produced by BRT in the United States District Court.

In the light of these facts, as shown in the opinion of the Court of Appeals, particularly its summing up (R. 306), it cannot be doubted that the Adjustment Board exceeded its authority. The Seventh Circuit did not review the Adjustment Board's interpretation of the contract. On the contrary, it found that the Adjustment Board had nothing to interpret; that it did not even pretend to interpret the contract; and that, by means of usurping a power not conferred on it by statute, it presumed to rewrite the contract for BRT and Santa Fe.

The District Court of Missouri reached the same opinion in the *Templeton* case and the rationale of the latter decision confirms what we have stated.

What is said at page 36 of the brakemen's petition, merely repeats what was in their motion to vacate and dissolve the temporary restraining order entered October 31, 1944 (R. 117-124), which was completely answered by the December 12, 1947 memorandum decision of United States District Judge LaBuy, who said:

"The award could not become final and enforceable

until after the petition for rehearing had been heard or withdrawn; prior to that time the rights of the parties must necessarily be in abeyance. The award was therefore an enforceable award at the time the complaint was filed." (R. 131)

VIII.

The Findings of Fact and Conclusions of Law Were Adequate to Support the Judgment.

(In Reply to Pages 36-38 of Brakemen's Petition.)

Findings of fact and conclusions of law were entered by the court below in support of its temporary restraining order of January 16, 1948. (R. 135-143) On February 6, 1948, it again made findings of fact and conclusions of law and an order for temporary injunction. (R. 201-208) An examination of the lengthy findings and conclusions, is sufficient, we believe, to establish that the decision before this Court is amply supported.

The issue for decision was whether plaintiffs had been deprived of a notice to which they were entitled under the law, and whether they were otherwise wrongfully deprived of their rights. The whole argument at pages 36 to 38 of the brakemen's petition, as can almost fairly be said of the entire petition before this Court, is built around the April 27, 1944 memorandum agreement between BRT and Santa Fe, which states that it was made for the purpose of implementing and complying with the award. (R. 155, 164) The brakemen presented this same argument to the Court of Appeals in their petition for rehearing (R. 309-318), and they called on the Court of Appeals to "state definitely what its holding is with respect to the agreement of April 27, 1944". (R. 313) In their petition for rehearing the brakemen quoted from the oral argument before the Court of Appeals (R. 312-313) and they insisted

that Santa Fe had committed itself to the proposition that the April 27, 1944 agreement and Award 6640 were "all wrapped up together". They quoted from Santa Fe's oral argument that the agreement "would not have been entered into except for the award. It was entered into in compliance with the award." (R. 313)

The substance of the argument made by the brakemen in their petition for rehearing before the Seventh Circuit was that unless the court granted a rehearing and thereafter expressly said something, in a rehearing opinion, about the April 27, 1944 agreement, the necessary implication would be that the memorandum agreement must be taken to have fallen with the award which the Seventh Circuit declared void. Santa Fe did not dodge this issue in its answer to the petition for rehearing in the Court of Appeals but met it squarely and completely. (R. 329-331) We submit that, under these facts and circumstance, what has been described by the brakemen at pages 36 and 37 of their petition as the "complete silence" of the Court of Appeals, is exactly the opposite, and that by every reasonable implication the Court of Appeals has given the brakemen to understand what its decision means, with no less certainty than did the District Court of Missouri in the *Templeton* case, which expressly declared:

"The letter agreements entered into by the Santa Fe and Trainmen, giving legal effect and enforcement to said awards, are illegal and void and their application to plaintiff and members of the class here represented, in destruction of their right to employment, at will, by the Santa Fe are restrained and enjoined." (Appendix, p. 16)

IX.**The Amount of the Injunction Bond Was Within the Discretion of the Trial Court.**

(In Reply to Pages 39-40 of Brakemen's Petition.)

On the question of inadequacy of the injunction bond, Santa Fe says that the same point was present before this court in the case of *Missouri-Kansas-Texas R. Co. v. Randolph*, 164 F. (2d) 4 (1947, C. C. A. 8). There were two petitions for certiorari (Dockets 661 and 711). The M-K-T Railroad's petition (Docket 711) urged that the \$500 bond was wholly insufficient to cover the potential liability. The Railroad contended that it was error for the District Court to overrule its motion to increase the amount of the bond from \$500 to \$200,000. In the M-K-T Railroad's petition for certiorari it pointed out that the Eighth Circuit did not pass on the inadequacy of the bond; with the net result that the Railroad petitioners had only a \$500 bond to protect them against a potential liability of more than \$300,000, as of March 31, 1948; and increasing at the rate of more than \$500 per day.

From this we see that the same point was presented by the Missouri-Kansas-Texas Railroad Company in its petition for certiorari, which this Court denied.

Conclusion.

The powerful and well reasoned opinion of the United States Court of Appeals for the Seventh Circuit (R. 299-307) is clearly right. The effect of the decision is to leave the parties just as they were before the void award was rendered, so that they can avail themselves of the lawful avenues of conduct provided for them in the Railway Labor Act. (R. 302) A denial of certiorari will, therefore,

bring about a compliance with the legitimate methods of collective bargaining.

The record in this case discloses that the First Division of the National Railroad Adjustment Board by-passed and defied the command of the Railway Labor Act. The Seventh Circuit condemned and denounced the conduct of the Adjustment Board. (R. 306)

At page 326 of the record, Santa Fe commented on a series of cases in which the Court of Appeals for the Seventh Circuit has preserved the Railway Labor Act from mutilation. Among them was the case of *Delaware & Hudson R. Corporation v. Williams*, 129 F. 2d 11 (7th Cir. 1942). We can think of no better way to conclude our brief than to quote what the carrier members of the First Division, National Railroad Adjustment Board, said in the brief which they filed in this Court (October Term, 1942, Docket 446-447) :

"If any party to a proceeding before the Board should be tempted again to pursue the plan followed here, it is clear, we believe, that the decision below is the only one which can preserve the integrity and effectiveness of the Adjustment Board."

For the reasons set out in this answer, Santa Fe respectfully prays that the writ be denied.

Respectfully submitted,

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Railway Company, De-
fendant-Respondent.*

May 9, 1949.

APPENDIX.

IN THE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

HAROLD H. TEMPLETON,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, PANHANDLE AND SANTA FE RAILWAY COMPANY, a corporation, and BROTHERHOOD OF RAILROAD TRAINMEN, a voluntary, unincorporated association,

Defendants.

No. 4234.

FINDINGS OF FACT.

Plaintiff is a citizen, resident and inhabitant of the State of Missouri. The individual members of the class that plaintiff here represents are citizens and inhabitants of various other States. The class which plaintiff here represents consists of approximately Two Hundred and Seventy-five (275) members, employees of the defendants Atchison, Topeka and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company, having a common interest in the relief here sought and whose several rights and property will be directly affected hereby. Defendant Atchison, Topeka and Santa Fe Railway Company is a corporation, incorporated under the laws of the State of Kansas. Defendant Panhandle and Santa Fe Railway Company is a

corporation, incorporated under the laws of the State of Texas. Defendant Brotherhood of Railroad Trainmen is a voluntary, unincorporated association and labor union, having its residence and principal place of business at Cleveland, Ohio. The matter here in controversy between the parties exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

For many years, beginning sometime prior to 1892 and to September 15, 1945, the defendant Atchison, Topeka and Santa Fe Railway Company, and Panhandle and Santa Fe Railway Company (both said defendants will hereafter be referred to as "Santa Fe" regardless of their corporate entity and the particular portion of the Santa Fe system they served), have uniformly by custom and practice, employed in "joint service" on the Eastern and Western Lines of the Santa Fe, express messengers also in the employ of the Railway Express Agency, Incorporated, or one of its predecessors (hereafter termed "Express Company"), for the handling of United States mail, baggage, Santa Fe mail, company material, and other items transported and carried by the Santa Fe in baggage cars on certain of its passenger trains. It now employs such express messengers in "joint service" on that portion of its railroad known as the Coast Lines. (The Eastern and Western Lines of the Santa Fe, informally stated, extend from Chicago, Illinois, to Albuquerque, New Mexico. The Coast Lines extend from Albuquerque, New Mexico, to Los Angeles, California, and along the Pacific Coast.)

The custom and practice of employing express messengers in such "joint service" arose perforce of certain written contracts entered into between the Santa Fe and the Express Company. Under said contracts it was agreed that the Express Company could arrange with the Santa Fe for station and train employees of the Santa Fe to act as agents and express messengers of the Express Company to handle

express at railroad stations, subject to rules of the Express Company; and, that the Santa Fe could arrange with the Express Company for the agents and express messengers and other employees of the Express Company to act as station or train employees of the Santa Fe, subject to the rules of the Santa Fe and upon such terms as may be agreed upon by the two companies. Said contract specifically provided that all agents and employees of the Express Company while on the premises or on lines of the Santa Fe should conform to the general rules of the Santa Fe then in force, and in case any messenger or other employee of the Express Company should from any cause be objectionable to the Santa Fe he would be removed or discharged upon the written request of the Santa Fe.

Under such arrangement, the Express Company has during all the times here in question hired express messengers who have been so engaged in "joint service" on the Santa Fe. The term "joint service" or "joint serviceman" as hereafter used, means a type of employment whereby one individual serves as an express messenger and handles express for the Express Company, and also serves as a "train baggageman" and handles baggage, United States mail, railroad mail, and other items of railroad property. All the work so performed by such an individual is done in a baggage car operated by the railroad as part of the consist of passenger trains.

"Joint service" exists on practically all railroads operating west of the Mississippi River and east of the Pacific Coast.

At the present time and in recent years, the Brotherhood of Railway & Steamship Clerks, Etc. Union is, and has been, the collective bargaining agent for express messengers. The only existing collective bargaining agreement governing rates of pay, hours and working conditions for express messengers, whether in "joint service" or other-

wise, is between the Clerks' Union and the Express Company. (No such agreement exists on behalf of any such employees with the Santa Fe. The Santa Fe could, of its own volition, terminate "joint service" on its lines at will.) Under the provisions of the collective bargaining agreement which the Clerks' Union has with the Express Company, the latter is given the right to establish seniority districts for all express messengers in its employ. Express messengers employed by the Express Company work in depots, on trains as express messengers only, and some of them work in "joint service". Separate rosters or seniority lists are maintained by the Express Company for each such job classification. When an express messenger is hired by the Express Company and awarded a regular job, his depot seniority begins; when such a messenger enters train service or "joint service" he acquires what is termed "road seniority". Both such seniorities continue to accrue to an express messenger in the employ of the Express Company after he enters train or "joint service" and such employee can bid back and forth for positions in each such job classification on the several railroads employing "joint service". The bargaining agreement the Clerks' Union has with the Express Company provides for the bulletining of vacancies occurring in "joint service". When such a vacancy occurs on the Santa Fe, the Express Company bulletins such vacancy and express messengers are invited to bid therefor. Ten (10) days after the date of filing bids, the Express Company posts a notice on the bulletin board, showing who is the successful bidder. The Santa Fe is thereupon notified of the person who is the successful bidder for a given train run, on which "joint service" is employed, and the successful bidder for such job then reports to the Santa Fe Baggage Car on that particular run, and thereupon enters "joint service" on the Santa Fe. The Santa Fe at all times had knowledge of the bargaining agreement between the

Express Agency and the Clerks' Union, and that jobs in "joint service" on its trains were filled by right of seniority arising perforce of such bargaining agreements. Express messengers in "joint service" are known and referred to by the Express Company and the Santa Fe as "messenger-baggagemen". "Messenger-baggagemen", when handling express while in "joint service", are subject to the direction, instruction and control of the Express Company. When they handle baggage, United States mail, etc., the Santa Fe retains the right to direct and instruct, and did direct and instruct, "messenger-baggagemen" in all phases of such baggage work. The Santa Fe issued printed instructions to "train baggagemen" governing the handling of baggage and mail carried by it. Such instructions were received and followed by "messenger-baggagemen" in "joint service"; and, various daily reports required to be made by train baggagemen were made by "messenger-baggagemen" and submitted to the Santa Fe's General Baggage Agent. All "messenger-baggagemen" employed in "joint service" were paid for all work performed by them directly by the Express Company. The Santa Fe reimbursed the Express Company to at least fifty percent (50%) of the compensation so paid "messenger-baggagemen". The Santa Fe also pays to the Express Company one-half of the Railroad Retirement Tax paid by the Express Company for express messengers into the Railroad Retirement Fund established by the Railroad Retirement Act of 1937 (*Title 45, U. S. C. A., 214, etc.*). "Joint-servicemen" are and were subject to the provisions of the Railroad Retirement Act of 1937. In addition thereto, the Santa Fe grants passes to "messenger-baggagemen" on the same basis that passes are and were granted by it to all Santa Fe employees, and "messenger-baggagemen" receive from the Santa Fe, by reason of their "joint service", other incidental advantages.

In the year 1892, the Santa Fe and defendant Brotherhood of Railroad Trainmen (hereinafter referred to as "Trainmen") first entered into a contract prescribing rules, rates of pay and working conditions for brakemen and baggagemen employed by the Santa Fe. There has at all times since been in effect such a contract between said parties. The Brotherhood of Railway Trainmen is, pursuant to Section 2, Third, of the Railway Labor Act of 1926 (Title 45, U. S. C. A., 152, Third) the collective bargaining agent for all employees of the Santa Fe denominated as brakemen and baggagemen. Sections 29 and 23 of the bargaining agreement between the Santa Fe and Trainmen, provide:

"ARTICLE XXIX. The term 'Trainman' or 'Trainmen,' as used in this agreement, is understood to mean freight and passenger Brakemen, and Baggage men, with the further understanding that this definition does not change, alter or extend present application of these rules to baggagemen or train porters."

"ARTICLE XXIII.

(a) All vacancies occurring in baggage runs not controlled by joint service shall be filled from the ranks of eligible and competent brakemen; oldest brakemen to have preference in all extra or special runs or excursion trains.

(b) When a brakeman is required to take charge of or handle baggage, regular or extra brakeman shall perform the service; oldest man to have the preference."

Some time prior to the year 1935, a grievance arose between the Santa Fe and twelve (12) baggagemen, eight (8) of whom were members of the class of train service employees represented by the Trainmen. As a consequence thereof, a protest petition was filed by the Trainmen against the Santa Fe, before the First Division of the National Railroad Adjustment Board, pursuant to Section 3, of the Railway Labor Act of 1926 (Title 45, U. S. C. A.,

153). Tersely stated, the dispute there involved arose out of the protest of twelve (12) baggagemen whose employment in baggage service on Santa Fe Trains Nos. 3 and 4, running between Chicago and Albuquerque had been discontinued on June 20, 1931, and whom the Santa Fe had replaced in such service with Barbers employed on said trains. Subsequent thereto, in the years 1939 and 1940, five (5) other protests were filed by the Trainmen against the Santa Fe, before the National Railroad Adjustment Board, First Division, involving the right to perform baggage work on certain other trains of the Santa Fe operating in the Eastern and Western Divisions. The substance of such protests was that the Trainmen claimed that "the handling of baggage on any and all the carrier's trains in service * * * properly belongs to trainmen holding seniority as brakemen" under the bargaining agreement the Trainmen had and now have with the Santa Fe; that express messengers, employees of the Santa Fe who did not have, or acquire, seniority as brakemen under such bargaining agreement should not be used as "train baggagemen"; and, that certain brakemen, holding seniority rights, who were not given train baggage work, should "be reimbursed for any monetary loss occasioned by reason of their displacement by express messengers." In said proceedings, the Trainmen specifically alleged in their said protest claims, and contended before the First Division, National Railroad Adjustment Board, that express messengers then engaged in baggage work by the carrier were "employees of the A. T. & S. F. Railway Company" and that for such baggage work express messengers were paid "exclusively out of the funds of the carrier (and) therefore, they are not joint employees" of the Santa Fe and Express Agency, so far as baggage work was there involved in such protest proceedings. Plaintiff and no member of the class he represents in this instant

Appendix.

action, nor the Brotherhood of Railway & Steamship Clerks Etc. Union, were given any notice by the Santa Fe, the Brotherhood of Railroad Trainmen, or the National Railroad Adjustment Board, of the pendency of such protest proceeding before the National Railroad Adjustment Board, First Division, and plaintiff and no member of the class he represents, or the Brotherhood of Railway & Steamship Clerks, Etc. Union, were made parties to, or appeared in person or otherwise, in any such proceedings. April 20, 1942, the employee representatives and referee, constituting a majority of the First Division, National Railroad Adjustment Board, entered and promulgated in said proceedings, Awards numbered 6635, Docket No. 7684; 6636, Docket No. 10405; 6637, Docket No. 7685; 6638, Docket No. 7686; and 6639, Docket No. 7687; referred to in the evidence. Plaintiff and all the members of his class did not learn of said proceedings and the effect of such awards until shortly before their services were terminated and they were displaced by brakemen, on September 15, 1945.

At the time of the promulgation of such awards, "joint-servicemen" on that part of the Santa Fe Railway known as the Coast Lines, handled practically all baggage, United States mail, Santa Fe company mail, and other items carried and handled by the Santa Fe on its passenger trains operated on the Coast Lines, and such work in part was handled by "joint-servicemen" on that part of the Santa Fe Railway known as the Eastern and Western Lines. In the majority of instances, baggage and express carried on passenger trains then operated by the Santa Fe, was handled by "joint-servicemen" in the employ and under the supervision, direction and control of the Santa Fe.

After publication of the aforesaid awards, the Santa Fe filed petitions before the Railroad Adjustment Board, First Division, for a rehearing on said claims and protests. A majority of said Board failed and neglected to pass or rule

on said motions for a rehearing for more than eighteen months. While said petitions for rehearing were so pending, and as a result of the impact of said awards, the penalties therein assessed against the Santa Fe, and upon demand of the Brotherhood of Railroad Trainmen, certain negotiations were carried on between representatives of the Trainmen and the Santa Fe for the purpose of settling the matters then in dispute between said parties and making effective the provisions of said awards. The awards of the Railroad Adjustment Board, First Division, above referred to, had not at that time been made effective or been applied by the Santa Fe. One S. C. Kirkpatrick, as a representative of the Santa Fe, and one Frank W. Coyle, as a representative of the Trainmen, were selected by the respective parties to carry on such negotiations. On or about April 27, 1944, said individuals entered into an accord on behalf of the Santa Fe and the Trainmen, whereby the awards made by the National Railroad Adjustment Board, First Division, in the aforesaid proceedings, Nos. 6636, 6637, 6638, and 6639, were made effective and the penalties provided for therein were adjusted and paid by the Santa Fe to the brakemen involved in said proceedings. (B. of R. T. Exhibit 5.) Neither the representative of the Santa Fe nor that of the Brotherhood intended by the negotiations then conducted, or the accord or agreement then entered into, to alter, change or modify the terms of the bargaining agreement then existing between the Santa Fe and the Brotherhood of Railroad Trainmen in any respect. The purpose of said negotiations and the agreement effected by the parties thereto was to put the principles of the awards, *supra*, of the National Railroad Adjustment Board, First Division, into effect and to make a practical application of said awards to the baggage operations of the Santa Fe then conducted on its Eastern and Western Lines. As a consequence of said

accord, the Santa Fe withdrew the petitions for rehearing previously filed before the First Division of the National Railroad Adjustment Board, because the subject-matter of said awards was disposed of by mutual agreement between the Santa Fe and the Trainmen, and said awards became final and binding on the Santa Fe.

As a result of the awards, *supra*, of the First Division of the National Railroad Adjustment Board and the accord then reached between the parties, implementing said awards and defining the manner in which they should be made effective, the Santa Fe terminated the service of all messenger-baggagemen then employed by it as "train baggagemen" upon its Eastern and Western Lines, as of September 15, 1945, and thereafter engaged brakemen-baggagemen, members of the Brotherhood of Railroad Trainmen, to handle all such baggage on its passenger trains operated on its Eastern and Western Lines. Since September 15, 1945, the Santa Fe has only employed brakemen for the purpose of handling baggage on said trains. At the time messenger-baggagemen were employed in "joint-service" by the Santa Fe to handle baggage, and since September 15, 1945, that brakemen-baggagemen have handled baggage on its trains, they have been commonly referred to and known as "train baggagemen." A "train baggageman" is an employee of the Santa Fe, and is a person handling and making necessary records of baggage, or baggage and mail, in the baggage car on a train. A train baggageman is not charged with any duties concerning the operation of the train.

As a result of the discontinuance and termination of the employment of "messenger-baggagemen" in "joint service", for the handling of baggage on the Eastern and Western Lines of the Santa Fe, fifty-four (54) messenger-baggagemen, employees of the Santa Fe and members of the class whom plaintiff represents lost their jobs, not

only with the Santa Fe, but with the Express Agency, also. Two hundred fifty (250) messenger-baggagemen were discontinued in "joint service" on the Santa Fe as a result of said awards, and the implementation thereof by the accord between the parties, as above stated. Such action resulted in a general reduction of the hours of employment and wages of all such messenger-baggagemen in joint service on the Santa Fe and the loss of other advantages previously enjoyed by said joint-servicemen by reason of their employment with the Santa Fe.

The termination of the use of joint-servicemen in the employ of the Santa Fe for the handling of baggage on the Eastern and Western Lines of the Santa Fe, directly resulted from the awards of the National Railroad Adjustment Board, First Division, Nos. 6635, 6636, 6637, 6638 and 6639, above referred to, and the letter agreements entered into between the Santa Fe and the Brotherhood of Railroad Trainmen for the purpose of implementing said awards and putting them into effect; that had it not been for the promulgation of said awards by the National Railroad Adjustment Board, First Division, and the accord reached between the Santa Fe and the Brotherhood of Railroad Trainmen at the insistence and demand of the Trainmen implementing said awards and putting the same into effect, the Santa Fe would not have discontinued the employment of messenger-baggagemen in joint service and in its employ for the handling of baggage on passenger trains operated by it on its Eastern and Western Lines on September 15, 1945. The discontinuance and termination of the employment of joint-servicemen in the employ of the Santa Fe was induced, procured and brought about by the Trainmen by the filing before the Railroad Adjustment Board of the claims and protests above referred to, which resulted in the promulgation of the awards and accord implementing the same, and the insistence and demand of

the Brotherhood of Railroad Trainmen made against the Santa Fe, that said awards be put into effect and complied with. The Santa Fe did not will to terminate the employment by it of "messenger-baggagemen" on its Eastern and Western Lines, independent of the awards of the National Railroad Adjustment Board, First Division, and the insistence and demand of the Brotherhood that said awards be complied with, and put into effect. The Santa Fe does not now will to discontinue or terminate "messenger-baggagemen" now in its employ upon the Coast Lines of its system, but because of the penalties assessed against it perforce of the awards, *supra*, and the demands the Brotherhood of Railroad Trainmen is now asserting against the Santa Fe, it is threatening to and will discontinue such "joint service" on its Coast Lines.

The Brotherhood of Railroad Trainmen now assert the right to perform and handle all baggage on any and all Santa Fe trains now in service by virtue of the awards of the National Railroad Adjustment Board, First Division, and the letter agreements entered into between the Santa Fe and the Trainmen, implementing said awards and making the same effective, and will continue to so assert, insist and demand, and thereby compel, induce and procure the further and continued discharge and displacement of messenger-baggagemen, employees of the Santa Fe. The enforcement of said awards and letter agreements implementing the same and making them effective deprive plaintiff and the members of his class, employees of the Santa Fe, of the right to continue to perform baggage work for the Santa Fe, at the will of the Santa Fe, uninfluenced and without illegal interference or compulsion of the Trainmen, and the impact of the awards of the National Railroad Adjustment Board, *supra*.

Conclusions of Law.

(1) The cause of action here asserted by plaintiff, arising under the Constitution and laws of the United States between citizens of different States and more than \$3,000.00 involved, the Court has jurisdiction of the parties and subject-matter thereof.

(2) The complaint herein states a claim upon which relief can be granted to plaintiff and the members of the class plaintiff here properly and legally represents, and the motion of defendant Brotherhood of Railroad Trainmen joined in its answer should be, and the same is hereby, overruled.

(3) Plaintiff and the members of the class he here represents are and were while in "joint service" handling baggage, United States mail, company mail and other property of Santa Fe, carried in its baggage cars, employees of the Santa Fe, at will. As such employees, they are and were "Trainmen" within the purview of Section 3(h) (*Title 45, U. S. C. A., Section 153(h)*) Railway Labor Act, and entitled to due notice and to be heard in the dispute involved in Awards 6635, Docket No. 7684; 6636, Docket No. 10405; 6637, Docket No. 7685; 6638, Docket No. 7686; 6639, Docket No. 7687; before the National Railroad Adjustment Board, First Division, in that their employment as "train baggagemen" with the Santa Fe, was directly determined and affected in said proceedings.

(4) That the aforesaid awards of the National Railroad Adjustment Board, First Division, are illegal and void, in that they were rendered by said Board, in violation of Section 3(j) (*Title 45, U. S. C. A., 153(j)*) of the Railway Labor Act, because plaintiff and the members of the class whom he represents involved in said proceedings, were given no notice thereof, or afforded an opportunity to be heard therein, either in person or by counsel.

(5) Compliance by the Santa Fe with the provisions of said awards deprives plaintiff and the class he represents, of property rights without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

(6) As employees at will of the Santa Fe, plaintiff and the members of the class he here represents were entitled to such employment at the will of the Santa Fe, without illegal interference, compulsion and unjustified interference by the Trainmen. That the insistence and demands of the Trainmen that the substance of the illegal and void awards of the National Railroad Adjustment Board be applied and made effective by the Santa Fe, under the circumstances here revealed, and the implementation and application of said awards effected by the letter agreements entered into between the Santa Fe and Trainmen, is and was unjustified, unwarranted and illegal interference with the employment at will by the Santa Fe, of plaintiff and the members of the class he here represents, and should be restrained and enjoined by this Court.

(7) That the letter agreements entered into between the Santa Fe and the Trainmen, not intended by the parties thereto to effect a modification, change or supplement to the bargaining agreement existing between said parties, this Court has jurisdiction to construe and determine the legal effect thereof, and upon a finding that said agreements are an application and implementation of illegal and void awards rendered by the National Railroad Adjustment Board, may restrain and enjoin the enforcement or further carrying into effect of said agreements.

(8) The awards of the National Railroad Adjustment Board, First Division, Numbers 6636 to 6639, inclusive, *supra*, adjudicating, as they do, that Trainmen are entitled to handle baggage on any and all trains of the Santa Fe and that such work belongs to trainmen holding seniority

as brakemen, to the exclusion of employees of the Santa Fe in "joint service", are void because that portion of said awards is and was beyond the authority and jurisdiction of the First Division, as defined in Section 3, First (i) of the Railway Labor Act. Such provision of said awards is not premised on any existing agreement between the Santa Fe and Trainmen, and in legal effect is the making of a new and different agreement and contract between the Santa Fe and the Traimen.

(9) The cross-claim filed by the Santa Fe, in this action, submits no justiciable issues of fact, and states no claim upon which relief can here be granted as therein prayed. Defendant Santa Fe, in this action neither admits nor denies any legal obligation to exclusively employ plaintiff or the members of his class, or brakemen acquiring seniority under its contract with the Trainmen to exclusively handle baggage carried on its passenger trains. By its cross-claim no affirmative relief is sought, unless this Court should determine that plaintiff and the members of his class, or brakemen, have the exclusive right to employment as "train baggagemen" on said trains. Said defendant by its cross-claim only seeks of this Court an advisory opinion by way of declaratory judgment as to the proper legal construction to be given to the provisions of its bargaining agreement with the Trainmen. This Court has no jurisdiction to construe said agreement and should not give legal advice or render an advisory opinion thereon when no justiciable controversy is shown to exist. Defendant Santa Fe's cross-claim herein should be, and the same is hereby, dismissed.

(10) Plaintiff and the members of the class he here represents, have no adequate remedy at law. Defendants are restrained and enjoined

(1) From giving legal effect and enforcement to Awards 6635, 6636, 6637, 6638 and 6639, *supra*, of the National Railroad Adjustment Board;

(2) The letter agreements entered into by the Santa Fe and Trainmen giving legal effect and enforcement to said awards are illegal and void, and their application to plaintiff and members of the class here represented, in destruction of their right to employment, at will, by the Santa Fe, are restrained and enjoined;

(3) The effect of the injunction here issued is to place the parties hereto in the same position they occupied on September 15, 1945, and as though no awards of the National Railroad Adjustment Board had been rendered and no agreements entered into between Santa Fe and Trainmen, implementing said awards and enforcing the same.

The parties are not restrained and enjoined from pursuing any remedies they may have under the Railway Labor Act.

Counsel prepare decree.

ALBERT A. RIDGE,
Judge.

Dated at Kansas City, Missouri, this 30th day of March,
1949.